

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

|                           |   |                   |
|---------------------------|---|-------------------|
| UNITED STATES OF AMERICA, | ) |                   |
|                           | ) |                   |
| Plaintiff/Respondent,     | ) |                   |
|                           | ) |                   |
| vs.                       | ) | No. CR 10-130-JAP |
|                           | ) | CV 14-720 JAP/CG  |
| CARL EMANUEL HAESE,       | ) |                   |
|                           | ) |                   |
| Defendant/Petitioner.     | ) |                   |

**UNITED STATES' SUPPLEMENTAL BRIEF**

The United States hereby provides supplemental briefing, per Court Order, on the issue of whether an evidentiary hearing is necessary where a petitioner claims in a sworn 28 U.S.C. § 2255 motion that his counsel failed to file a Notice of Appeal after being directed to do so.

I. Relevant Facts

On January 15, 2010, Defendant pled guilty to a one-count information charging Wire Fraud, in violation of 18 U.S.C. § 1343. CR Doc. 23.<sup>1</sup>

On March 22, 2012, the Court sentenced Defendant to 27 months imprisonment and restitution in the amount of \$164,522.33. CR Docs. 62, 70; Ex. 3 at 54, 56.<sup>2</sup>

On April 3, 2012, the Court entered Judgment. CR. Doc. 64.

On June 29, 2012, the Court entered an Amended Judgment modifying the amount of restitution. CR Doc. 70.

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<sup>1</sup> Citations to CR Doc. \_\_\_\_ “refer to the number of the document on the District Court’s docket sheet for Defendant’s criminal case, 10-CR-130 JAP.

<sup>2</sup> Ex. 3 is the sentencing hearing transcript which was filed as an attachment to CR Doc. 85.

On August 15, 2014, Defendant filed a Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody under 28 U.S.C § 2255. CR Doc. 77, CV Doc. 1.<sup>3</sup> In his motion, Defendant alleges one claim summarized as follows:

Claim One: His attorney was ineffective because his attorney failed to file a timely notice of appeal after Defendant requested him to do so.

The time-limit for Defendant to file a § 2255 motion expired on July 15, 2013.

## II. Law and Legal Analysis

If the Court finds, as it should, that Defendant's § 2255 motion is untimely, no evidentiary hearing is needed. This is true even if Defendant's § 2255 claim is that he directed his attorney to file a Notice of Appeal and his attorney failed to do so. *See United States Guerrero*, 488 F.3d 1313,1315-1316 (10th Cir. 2007) (remanding case for a hearing to determine whether the defendant requested counsel to file a notice of appeal, finding that the issue was raised within the one-year time limit set by AEDPA).

If, however; the Court finds that Defendant's § 2255 motion is timely, Defendant is entitled to an evidentiary hearing. When the issue is whether a defendant requested his attorney to file a Notice of Appeal and the attorney failed to do so, the defendant is entitled to an evidentiary hearing on the issue, so long as the issue is raised timely. *See Guerrero* at 1313; *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005); *United States v. Lee-Speight*, 529 F.App'x 903 (10th Cir. 2013).

Because Defendant's § 2255 motion is untimely (it was filed 13 months after the one-year time limit set by AEDPA), no evidentiary hearing is needed. If, however; the Court finds

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<sup>3</sup> Citations to "CV Doc.\_\_\_\_" refer to the number of the document on the District Court's docket sheet for Defendant's civil case, 14-CV-720 JAP/CG.

that Defendant's § 2255 motion is timely, Defendant is entitled to an evidentiary hearing on the issue of whether he asked his attorney to file a Notice of Appeal and his attorney failed to do so.

III. Conclusion

Defendant is not entitled to an evidentiary hearing because his § 2255 motion is untimely. This is true even though his single claim is that he requested his attorney to file a Notice of Appeal and his attorney failed to do so.

Respectfully submitted,

DAMON P. MARTINEZ  
United States Attorney

**Electronically filed on 8/21/2015**

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and mailed a copy of the foregoing on August 21, 2015 to Defendant/Petitioner at the following address:

Carl Emanuel Haese  
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\_\_\_\_\_/s/  
MARK A. SALTMAN  
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